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8 UNITED STATES DISTRICT COURT  
9 CENTRAL DISTRICT OF CALIFORNIA

10 JULIETA DAHMLow, ) Case No. CV 06-3991-PJW  
11 Plaintiff, )  
12 v. ) MEMORANDUM OPINION AND ORDER  
13 MICHAEL J. ASTRUE, )  
14 COMMISSIONER OF THE SOCIAL )  
15 SECURITY ADMINISTRATION, )  
16 Defendant. )  
17

18 I.

19 INTRODUCTION

20 Before the Court is Plaintiff's appeal of a decision by Defendant  
21 Social Security Administration ("the Agency"), denying her application  
22 for Disability Insurance Benefits ("DIB") and Supplemental Security  
23 Income ("SSI"). For the reasons set forth below, the decision is  
24 reversed and the case is remanded for further proceedings.

25 II.

26 SUMMARY OF PROCEEDINGS

27 After Plaintiff's applications were denied by the Administrative  
28 Law Judge ("ALJ") and the Appeals Council, Plaintiff filed an action  
in this Court, seeking to have the Agency's decision overturned. On

1 December 24, 2003, the parties stipulated to remand the case to the  
2 Agency to "reevaluate the severity of Plaintiff's seizure disorder  
3 with reference to the Listings," and to reexamine the issue of  
4 Plaintiff's credibility. (Administrative Record ("AR") 380-81.)

5 On November 7, 2005, a hearing was conducted before a different  
6 ALJ. (AR 323-43.) On December 2, 2005, that ALJ denied Plaintiff's  
7 application in a written decision. (AR 306-17.) Plaintiff's request  
8 for review was denied by the Appeals Council on March 24, 2006. (AR  
9 301-03.) On June 23, 2006, Plaintiff lodged a Complaint in this  
10 Court, raising three grounds for review:

11 1. The ALJ did not properly evaluate Plaintiff's epilepsy.

12 2. The ALJ did not properly evaluate Plaintiff's mental  
13 impairments.

14 3. The ALJ failed to articulate clear and convincing reasons  
15 for rejecting Plaintiff's subjective complaints.

16 (Joint Stip. at 3.)

17 III.

18 ANALYSIS

19 A. Standard of Review

20 "Disability" under the applicable statute is defined as the  
21 inability to perform any substantial gainful activity because of "any  
22 medically determinable physical or mental impairment which can be  
23 expected to result in death or which has lasted or can be expected to  
24 last for a continuous period of not less than twelve months." 42  
25 U.S.C. § 1382c(a)(3)(A). The Court may overturn the Agency's decision  
26 that a claimant is not disabled only if the decision is not supported  
27 by substantial evidence or is based on legal error. *See Magallanes v.*  
28 *Bowen*, 881 F.2d 747, 750 (9th Cir. 1989).

1 Substantial evidence ``means such relevant evidence as a  
2 reasonable mind might accept as adequate to support a conclusion.'"  
3 *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (quoting *Consol.*  
4 *Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). It is "more than a  
5 mere scintilla but less than a preponderance," *Tidwell v. Apfel*, 161  
6 F.3d 599, 601 (9th Cir. 1998), and "does not mean a large or  
7 considerable amount of evidence," *Pierce v. Underwood*, 487 U.S. 552,  
8 565 (1988).

9 B. The ALJ's Evaluation Of The Medical Evidence

10 Plaintiff claims that the ALJ erred in concluding that her  
11 epilepsy was controlled when she was compliant with her medications  
12 and, therefore, assuming that she was compliant, could still perform  
13 her past relevant work. Plaintiff contends that this finding was  
14 erroneous and that the record established that she suffered seizures  
15 even when she took her medications as prescribed. (Joint Stip. at 4.)  
16 For the following reasons, this claim is rejected.

17 The ALJ detailed treatment records from Plaintiff's treating  
18 physician, Dr. Mitchell Kaufman, which revealed that Plaintiff had not  
19 always been compliant in taking her medication, but that, when she  
20 was, her seizures were largely well-controlled. For example, in a  
21 neurological consultation letter dated January 5, 2000, Dr. Kaufman  
22 stated that Plaintiff "may occasionally miss a dose of both  
23 anticonvulsant agents [Dilantin and Depakote]." (AR 671.) In the  
24 same report, Dr. Kaufman noted subtherapeutic levels of these  
25 medications and increased the prescription level of Depakote. (AR  
26 672, 674.)

27 In a report dated January 31, 2000, Dr. Kaufman noted that  
28 Plaintiff "ran out of Depakote on 1/15/00 and did not take this

1 medication for 72 hours," and, thereafter, experienced grand mal  
2 seizures on consecutive days from January 20 to 22. (AR 667-68.) He  
3 remarked that, "[a]side from recent breakthrough seizures presumably  
4 attributed to a subtherapeutic Depakote level, [Plaintiff]'s epilepsy  
5 appears better controlled with a higher maintenance dose of Depakote,"  
6 and again increased Plaintiff's Depakote prescription. (AR 669.)

7 On April 10, 2000, Dr. Kaufman stated that "much better seizure  
8 control has been attained after increasing the maintenance dose of  
9 Depakote," but noted that "sporadic breakthrough episodes continue to  
10 occur." (AR 657.) He prescribed Mysoline to "ameliorate recent onset  
11 tremor" and "provide better seizure control." (AR 658.) On May 31,  
12 2000, Dr. Kaufman reported that Plaintiff had been unable to refill  
13 her Depakote prescription while vacationing in Mexico and had been  
14 taking smaller than prescribed doses for the previous three weeks.  
15 (AR 655.) Dr. Kaufman attributed three "breakthrough simple partial  
16 seizures" to the subtherapeutic levels of her medications and  
17 specifically noted that Plaintiff "realizes how fortunate she was that  
18 more severe seizures did not occur while taking only 60% of the  
19 recommended Depakote maintenance dose for the past several weeks."  
20 (AR 655-56.)

21 On August 28, 2000, Dr. Kaufman noted that Plaintiff had reported  
22 an average of three to four "aura" episodes each month, despite  
23 apparent compliance with her medication.<sup>1</sup> (AR 653.) However, Dr.  
24 Kaufman also noted various stressors that Plaintiff was experiencing  
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27 <sup>1</sup> Plaintiff described these "aura" episodes as causing her to  
28 "just stare, but I don't even remember looking" for approximately  
three to five minutes, after which she feels "very tired." (AR 364.)

1 in her life during this period, including not sleeping or eating well  
2 and dealing with a screaming child who was experiencing separation  
3 anxiety in kindergarten. (AR 653.)

4 On October 11, 2000, Dr. Kaufman noted that Plaintiff had  
5 experienced a nighttime "breakthrough seizure" episode one week before  
6 her visit. (AR 651.) He attributed this episode to Plaintiff not  
7 taking her medication, noting that, "[b]ecause breakthrough seizures  
8 appeared a few days after running out of phenobarbital, recurrent  
9 ictal activity is not worrisome at this time."<sup>2</sup> (AR 651.)

10 On November 20, 2000, Dr. Kaufman noted a possible nighttime  
11 seizure that did not appear to cause Plaintiff any distress or loss of  
12 functioning. (AR 649.) He opined that "a breakthrough ictal episode  
13 did not occur." (AR 650.) That same day Dr. Kaufman completed a form  
14 entitled "Seizures Residual Functional Capacity Questionnaire," on  
15 which he noted that Plaintiff experienced an average of one to two  
16 seizures per month, which were precipitated, in his opinion, by  
17 "stress, lack of sleep, illness, missed dose of medication." (AR 659-  
18 60.) Dr. Kaufman noted that Plaintiff had a "favorable response" to  
19 Depakote. (AR 661.) Additionally, and despite the records to the  
20 contrary, Dr. Kaufman indicated that Plaintiff was compliant with her  
21 medication. (AR 661.)

22 On December 18, 2000, Dr. Kaufman noted Plaintiff's report of two  
23 "aura" seizures occurring on December 6 and 7, which Plaintiff  
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28 <sup>2</sup> "Ictal" is defined as "referring to a sudden, sharp onset, as  
convulsions of an epileptic seizure." The Mosby Medical Encyclopedia.

1 believed to be stress-related. (AR 646.) Dr. Kaufman increased  
2 Plaintiff's dose of Mysoline for tremor reduction and improved seizure  
3 control. (AR 647.)

4 On January 22, 2001, Dr. Kaufman noted that "no obvious seizures  
5 have appeared since the last visit," but commented on a nighttime  
6 episode where Plaintiff had awoken suddenly feeling "very scared," an  
7 event he thought might represent a breakthrough simple, partial  
8 seizure. (AR 643-44.)

9 Plaintiff was not seen by Dr. Kaufman again until April 23, 2001.  
10 On that visit, she reported that her seizures were pretty well  
11 controlled when she took her medication. (AR 639.) Dr. Kaufman  
12 thought that a single aura episode occurring on February 12, 2001, was  
13 possibly stress-related. (AR 639.) He opined that, "[f]rom a  
14 neurological perspective, [Plaintiff] is clinically stable with  
15 respect to her seizure disorder as long as she maintains the same  
16 anticonvulsant regimen," and recommended that she return for an  
17 updated reassessment in four months. (AR 640.)

18 On August 27, 2001, Dr. Kaufman saw Plaintiff again. He noted a  
19 "probable seizure" occurring on July 8, 2001, during which Plaintiff  
20 "experienced an approximate two minute episode characterized by rapid  
21 heartbeat and a feeling of fear." (AR 636.) He also noted that blood  
22 tests revealed that Plaintiff's medication was at a therapeutic level.  
23 (AR 636.) Dr. Kaufman attributed the solitary episode to lack of  
24 sleep and, consequently, did not change Plaintiff's medication level.  
25 (AR 637.) He recommended that she return six months later. (AR 637.)

26 On February 25, 2002, Plaintiff returned to see Dr. Kaufman. He  
27 noted that Plaintiff reported no seizure activity for a six-month  
28 period, during which Plaintiff had been taking her medication. (AR

1 633.) Plaintiff did report, however, that on January 31, 2002, she  
2 experienced an "aura," "described as a 3-4 second episode of feeling  
3 panicky," an event which she experienced again for several consecutive  
4 days before meeting with Dr. Kaufman. (AR 633.) Dr. Kaufman did not  
5 rule out breakthrough simple, partial seizures, but also considered  
6 the possibility of anxiety attacks and prescribed Effexor for anxiety.  
7 (AR 634.)

8 On April 10, 2002, Dr. Kaufman noted that Plaintiff reported less  
9 anxiety and no seizure-like events since her last visit. (AR 631.)  
10 On October 9, 2002, Dr. Kaufman noted Plaintiff's report of two brief  
11 seizure episodes in June and September 2002, each lasting no more than  
12 six seconds. (AR 628.) Dr. Kaufman also noted that her seizures  
13 appeared well-controlled and he did not adjust her Depakote or  
14 Mysoline prescriptions. (AR 629.)

15 On April 9, 2003, Dr. Kaufman noted that Plaintiff reported  
16 taking no anticonvulsants for a period of four to five weeks in  
17 October and November 2002, due to problems with her medical insurance.  
18 (AR 625.) On December 27, 2002, Plaintiff experienced three small  
19 seizure episodes; on January 27, 2003, she experienced two episodes;  
20 and, on March 24 and 25, 2003, she experienced "single events." (AR  
21 625.) Dr. Kaufman attributed these partial seizures to  
22 "subtherapeutic anticonvulsant serum levels." (AR 625.)

23 Based on this evidence, the ALJ concluded that Plaintiff was non-  
24 compliant with her medication regimen and that, if she was compliant,  
25 the seizures would stop and she could perform her past work as a  
26 cashier and receptionist. (AR 315.) Plaintiff takes exception to  
27 this finding. She contends that the records show that she had  
28 seizures even when she was compliant.

1 The Court agrees that occasionally Plaintiff experienced  
2 seizures, or some form of seizures, like "auras," even when she was  
3 taking her medications as prescribed. The record also shows, however,  
4 that these episodes were much less severe and much less frequent when  
5 she was compliant. Further, during much of the time when she was  
6 taking her medications as prescribed, there were no seizures. Most  
7 significant in this entire analysis, however, is Plaintiff's treating  
8 physician's view that Plaintiff's seizures were the result of her  
9 failure to take her medications and that, when she took her  
10 medications, her seizures were controlled. (AR 629, 639, 640, 655-57,  
11 661, 669.) The ALJ was entitled to rely on this opinion and conclude  
12 that Plaintiff's condition was controllable with medication. Assuming  
13 that Plaintiff could control her seizures with medication, they would  
14 not preclude her from performing her work as a cashier/receptionist,  
15 and the ALJ did not err in reaching this conclusion.<sup>3</sup>

16 C. The ALJ's Evaluation Of Plaintiff's Mental Impairments

17 In Plaintiff's second claim, she contends that the ALJ erred when  
18 he determined at step two that Plaintiff's mental impairments were not  
19 severe. (Joint Stip. at 14-19.) For the following reasons, the Court  
20 agrees with Plaintiff.

21 At step two of the sequential evaluation process, the ALJ is  
22 tasked with identifying which impairments have more than a minimal  
23 effect on a claimant's ability to do basic work. *Webb v. Barnhart*,

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26 <sup>3</sup> Plaintiff raises for the first time that the subtherapeutic  
27 levels of medicine in her blood could be due to her body's inability  
28 to properly metabolize her medications. (Joint Stip. at 8.) There is  
no support in the record for this claim. Nor has any expert offered  
this opinion. As such, it is rejected.



1 433 F.3d 683, 686 (9th Cir. 2005). This is supposed to be a *de*  
2 *minimis* screening device and is intended to dispose of only groundless  
3 claims. *Id.* at 687.

4 State agency examining psychologist Dr. Dan Matzke diagnosed  
5 Plaintiff with a cognitive disorder (impaired intellectual functioning  
6 with deficits in memory and concentration), not otherwise specified,  
7 and a depressive disorder, not otherwise specified. (AR 703.) Dr.  
8 Matzke assessed Plaintiff's ability to maintain concentration,  
9 persistence, and pace; understand, remember, and carry out complex job  
10 instructions; respond appropriately to co-workers, supervisors, and  
11 the public; and respond appropriately to work situations/requirements  
12 as fair, meaning "markedly limited, but not precluded." (AR 703-04.)  
13 The reviewing state agency psychiatrist determined that Plaintiff  
14 would have "moderate" limitations in maintaining concentration,  
15 persistence, and pace. (AR 715.)

16 Contrary to these findings, the ALJ found that Plaintiff's mental  
17 impairments were non-severe and resulted only in "mild" restrictions  
18 in functioning. (AR 313-14.) In reaching this conclusion, he  
19 rejected the more severe restrictions found by psychologist Matzke and  
20 the reviewing state agency psychiatrist. The ALJ rejected Dr.  
21 Matzke's assessment because he concluded that it was based on the  
22 premise that Plaintiff suffered from a cognitive disorder, resulting  
23 from her seizure disorder. (AR 314.) The ALJ reasoned that, if  
24 Plaintiff took her medications as prescribed, she would not experience  
25 the degree of mental impairment assessed by Dr. Matzke. (AR 314.)  
26 Additionally, the ALJ found that the "moderate" limitation assessed by  
27 Dr. Matzke was inconsistent with Dr. Matzke's finding that Plaintiff  
28 had "mild deficits" in concentration and attention, and could handle

1 money (i.e., a checking account). The ALJ also noted that Plaintiff  
2 did not have any observable severe cognitive, emotional, or behavioral  
3 dysfunction. (AR 314, 700-02.) The ALJ pointed out that the previous  
4 ALJ's finding that Plaintiff did not have a mental impairment had not  
5 been disturbed on appeal, that the record showed no ongoing treatment  
6 for a psychological disorder, and that previous neurological  
7 examinations by Drs. Lee and Kim had failed to show "memory deficits"  
8 to support Dr. Matzke's conclusions. (AR 314, 589-98, 744-53.) As  
9 explained below, none of these reasons supports the ALJ's step-two  
10 finding that Plaintiff's mental impairment was not severe.

11 The ALJ concluded that, if Plaintiff took her medication, she  
12 would not suffer seizures and would not experience cognitive problems  
13 caused by the seizures. (AR 314.) The clear implication of this  
14 finding is that Plaintiff's cognitive problems were temporal and would  
15 dissipate if Plaintiff stopped having seizures. The problem with this  
16 analysis is that overlooks the fact that Plaintiff regularly suffered  
17 seizures over the years. (AR 311-12.) What Plaintiff raises here,  
18 and what the ALJ did not address, is the impact those seizures had on  
19 Plaintiff's cognitive functioning. Though the Court assumes that, if  
20 Plaintiff complied with her doctor's orders and took her medication  
21 she would not have had seizures, that does not answer the question of  
22 whether a lifetime of seizures has adversely affected her ability to  
23 think. Certainly, the experts who examined and tested Plaintiff have  
24 discerned some cognitive deficits, which may be linked to her  
25 seizures. (AR 703, 715.) That these deficits may have been avoided  
26 had Plaintiff taken her medication is not in issue. What is in issue  
27 is whether Plaintiff's cognitive disorder and borderline intellectual  
28 functioning affects her ability to work. By concluding at step two

1 that Plaintiff's mental impairment was not severe, the ALJ sidestepped  
2 this issue. On remand, he should address it.

3 The ALJ's other justifications for concluding that Plaintiff's  
4 cognitive impairment was not severe are equally unavailing. For  
5 example, he noted that Plaintiff was able to graduate from high school  
6 and complete one year of college. (AR 313.) Again, this has little  
7 relevance to Plaintiff's cognitive state 20 years after that  
8 schooling, where Plaintiff suffered repeated seizures over the course  
9 of that period.

10 The ALJ also relied on the fact that Plaintiff handles money and  
11 has a checking account. The Court is unclear as to the significance  
12 of these facts.<sup>4</sup> Dr. Matzke understood that Plaintiff handled money  
13 and had a checking account and still concluded that she had cognitive  
14 deficits. (AR 702-04.) It appears that the ALJ was reaching a  
15 different conclusion, i.e., that people who can handle money and a  
16 checking account are not cognitively impaired, when he found that  
17 Plaintiff's impairment was not severe. The Court wonders out loud as  
18 to the ALJ's basis for such a conclusion. Assuming he had one, he did  
19 not provide it to the Court for review. As such, it is rejected.

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22 <sup>4</sup> The Court is aware that Plaintiff's prior employment was as a  
23 cashier/receptionist. Though being able to handle money in her  
24 personal life and maintain a checking account may be indicative of an  
25 ability to handle money as a cashier at work, the two are not  
26 synonymous. Being a cashier involves continuously dealing with money  
27 under some time pressure. Handling one's own funds does not  
28 necessarily require the same skills. For instance, Plaintiff would  
presumably have unlimited time to write a check to pay a bill. And  
though there may be some minimal cognitive functioning needed to pay  
for groceries at a check-out counter, it would not require the same  
abilities as a cashier. Thus, not everyone who can buy groceries at a  
store could also work as a cashier at the store.

1       The ALJ also relied on the fact that the 2003 district court  
2 remand order and the 2004 Appeals Council decision did not overrule  
3 the previous ALJ's determination that Plaintiff did not suffer from a  
4 severe mental impairment. (AR 314.) The Court faults this analysis  
5 for several reasons. First, the remand order was based on the  
6 parties' stipulation. It was not a reasoned decision by the Court.  
7 Second, the Appeals Council's order was simply an administrative order  
8 to pass through to the ALJ the district court's order. The Appeals  
9 Council did not analyze the issues on its own. Despite that fact, the  
10 Appeals Council did instruct the ALJ to offer the Plaintiff an  
11 opportunity to be heard and to "take any further action needed to  
12 complete the administrative record and issue a new decision." (AR  
13 379.) Finally, Dr. Matzke did not perform his evaluation until after  
14 the district court and the Appeals Council ruled in Plaintiff's case.  
15 Thus, neither body could have addressed the findings of his report.

16       In the end, the Court concludes that there is enough evidence in  
17 this record to conclude that Plaintiff's mental impairment has more  
18 than minimally affected her ability to perform basic work activity.  
19 As such, her claim is not groundless and should have passed the *de*  
20 *minimis* screening test employed at step two. The ALJ's conclusion  
21 that Plaintiff did not meet this test is overruled.

22   D.   The ALJ's Credibility Determination

23       In Plaintiff's third claim, she contends that the ALJ failed to  
24 provide clear and convincing reasons for rejecting her subjective  
25 complaints. (Joint Stip. at 22-24.) She complains that the ALJ erred  
26 when he found that she was non-compliant with her medications and when  
27 he further found that this signaled that she was not telling the  
28 truth. She argues that she was compliant and that, despite this fact,

1 she experienced seizures. Plaintiff also contends that the other  
2 reasons the ALJ gave to discount her credibility--that there was no  
3 evidence of muscle atrophy due to inactivity, that her daily  
4 activities were inconsistent with her claimed disability, and that she  
5 lived independently--were not legitimate. (Joint Stip. at 22-23.)  
6 For the following reasons, the Court finds that the ALJ's reasons for  
7 rejecting Plaintiff's subjective complaints were supported by the  
8 record.

9 Credibility determinations are the province of the ALJ. *Fair v.*  
10 *Bowen*, 885 F.2d 597, 604 (9th Cir. 1989). In order to find a claimant  
11 not credible, however, an ALJ must provide specific, clear, and  
12 convincing reasons for doing so. *Thomas v. Barnhart*, 278 F.3d 947,  
13 959-60 (9th Cir. 2002).

14 The ALJ determined that Plaintiff's claim that she suffered from  
15 seizures even when compliant with her medication was not supported by  
16 the medical record. (AR 312.) As set forth above in Section B of  
17 this decision, a fair reading of Dr. Kaufman's records supports the  
18 ALJ's finding in this regard. It appears that Plaintiff's seizures  
19 were effectively controlled when she took her medication as prescribed  
20 but that she frequently failed to do so. (AR 604-99.) An ALJ may  
21 rely on an unexplained (or inadequately explained) failure to follow a  
22 prescribed course of treatment as evidence that a claimant is not  
23 credible. *Bunnell v. Sullivan*, 947 F.2d 341, 346-47 (9th Cir. 1991).

24 The ALJ also noted that examining doctor Kim concluded that  
25 Plaintiff showed no signs of having just suffered a seizure, despite  
26 her claim to him that she had one in his waiting room ten minutes  
27 before seeing the doctor. (AR 745.) The clear implication of this  
28 evidence is that Plaintiff was attempting to deceive the doctor and

1 feign a seizure, where none had occurred. Certainly, this was a  
2 proper consideration by the ALJ in assessing Plaintiff's credibility.  
3 See *Bunnell*, 947 F.2d at 346 (holding ALJ entitled to rely on ordinary  
4 techniques of credibility evaluation in assessing credibility).

5 The ALJ cited additional reasons for his credibility finding,  
6 including Plaintiff's daily activities and lack of muscle atrophy.  
7 Though the Court finds these reasons less persuasive, the ALJ's other  
8 reasons are adequate to support his finding and it is, therefore,  
9 affirmed.

10 E. Remand Or Reversal

11 Plaintiff asks the Court to reverse the Agency's decision and  
12 order a remand solely for the purpose of calculating and awarding  
13 benefits. She points out that the Agency has already had two chances  
14 to resolve her case and it should not be given a third, which will  
15 require an inordinate amount of time.

16 The Court recognizes that it has the power to award Plaintiff her  
17 requested relief, but concludes that this case does not warrant it.  
18 By finding that the ALJ erred in concluding at step two that  
19 Plaintiff's mental impairment was not severe, the Court has not  
20 reached the ultimate conclusion that Plaintiff is disabled. Rather,  
21 the Court solely concluded that the evidence shows that Plaintiff's  
22 mental impairment more than minimally affected her ability to work.  
23 Whether this impairment, when combined with her seizure disorder and  
24 taking into account her age, experience, and abilities, renders her  
25 disabled should, in the first instance, be decided by the Agency.  
26 Thereafter, if Plaintiff still disagrees with the Agency's decision,

1 she can return to this Court, at which time, assuming she can  
2 establish that the Agency erred again, the Court would be inclined to  
3 award benefits.

4 IT IS SO ORDERED.

5 DATED: March 18, 2008.  
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PATRICK J. WALSH  
UNITED STATES MAGISTRATE JUDGE  
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